

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NICKY DON HASHBARGER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. C2:13-CV-01988-RSM-JLW

REPORT AND
RECOMMENDATION

BASIC DATAs

Type of benefits sought:

(X) Disability Insurance

(X) Supplemental Security Income – Disability

Plaintiff's:

Sex: Male

Age: 43 at application, 49 at most recent ALJ hearing

Principal Disabilities Alleged by Plaintiff: Chronic depression, bipolar disorder, personality disorder, attention deficit disorder (ADD), memory impairment, hepatitis C, left knee injury, and left shoulder injury.

Disability Allegedly Began: April 15, 2007

Principal Previous Work Experience: construction worker, small product assembly, dishwasher

Plaintiff Last Worked: April 2007

Education Level Achieved by Plaintiff: 10th Grade

REPORT AND RECOMMENDATION - 1

PROCEDURAL HISTORY – ADMINISTRATIVE

Before ALJ MJ Adams:

Date of 1st Hearing: February 3, 2009

Date of Decision: April 9, 2009

Appears in Record at: Decision AR 105-113, Hearing Transcript AR 74-95

Summary of Decision:

The Claimant has not worked since his alleged onset date. He has severe impairments of depression, anxiety, personality disorder, and substance abuse. These impairments, alone or in combination, do not meet or medically equal a Listing. He has a Residual Functional Capacity (RFC) to perform a full range of work at all exertional levels. He can understand, remember and carry out simple instructions. He can respond to supervision, co-workers, work situations, and deal with change within a routine work setting. Based on this RFC, Claimant can perform his past relevant work as a construction laborer. He is not disabled.

Before Appeals Council:

Date of Decision: September 24, 2009

Appears in Record at: AR 114-117

Summary of Decision: Remand for further evaluation of physical and mental limitations.

Before ALJ MJ Adams:

Date of 2st Hearing: March 9, 2010

Date of Decision: April 22, 2010

Appears in Record at: Decision AR 9-22, Hearing Transcript AR 31-70

Summary of Decision:

Claimant has not worked since onset date. He has severe impairments of affective disorders, anxiety-related disorder, substance abuse (in partial remission), hepatitis C, and left knee injury. His medical records reference a personality disorder which is not medically determinable. These impairments do not meet or medically equal a Listing. Claimant has the RFC to perform light work with postural limitations to sitting, standing, walking, lifting, and overhead reaching. He can understand, remember, and carry out simple two to three step instructions, maintain attention and concentration. He can make judgments on simple work related decisions and respond appropriately to supervisors and coworkers. Given this RFC, Claimant is unable to perform any past relevant work. Based on the testimony of a Vocational Expert (VE) he can perform jobs of small product assembler and cleaner/housekeeping. Plaintiff is not disabled.

1 Before Appeals Council:

2 Date of Decision: July 27, 2010

3 Appears in Record at: AR 664-667

4 Summary of Decision: Declined Review

5 Before Magistrate Judge Theiler/Judge Lasnik –U.S. District Court: C10-1376-RSL

6 Date of Decision: July 12, 2011

7 Appears in Record: AR 707-734

8 Summary of Decision:

9 The ALJ erroneously determined that claimant's personality disorder was not medically
10 determinable. Without inclusion of the personality disorder, the Court was unable to
11 conclude that the ALJ considered all functional limitations. The error was not harmless.
12 On remand, the ALJ was directed to reevaluate medical evidence to determine if a
13 personality disorder should be included as a severe impairment and contribute
14 additional functional limitations. This includes further evaluation of the Plaintiff or
15 expert medical testimony if necessary to develop the record. The ALJ did not err in
16 evaluation of medical evidence and Plaintiff's credibility.

17 Before ALJ Ruperta Alexis:

18 Date of 3rd Hearing: March 16, 2012

19 Hearing Transcript AR 1128-1151

20 Date of 4th Hearing: February 7, 2013

21 Date of Decision: April 19, 2013

22 Appears in Record at: Decision AR 500-526, Hearing Transcript AR 527-570

23 Summary of Decision:

24 ALJ decided not to obtain further psychological evaluations for Claimant. Claimant has
had numerous psychological evaluations and his substance abuse creates the possibility
that he is not capable of meaningful participation in an evaluation. Claimant has not
worked since his alleged onset date. He has severe impairments of affective disorders,
anxiety-related disorder, substance abuse, hepatitis C, left knee injury, and non-severe
impairments of shoulder dislocation and personality disorder NOS. These impairments,
alone or in combination, do not meet or medically equal a Listing. Claimant has the
RFC to perform light work. The ALJ defined the RFC, "assuming the claimant is not
operating under the influence of substances." The RFC includes postural limitations to
lifting, sitting, standing, walking, climbing, and a manipulative limitation of no
frequent overhead reaching. He can understand, remember, and carry out simple,
repetitive, and routine tasks. He can accept instruction and direction from supervisors
and then work independently. He can communicate with member of the public but not
on a constant basis. Based on this RFC, a VE opined that Claimant cannot perform his

1 past relevant work. However, he can perform representative jobs of motel cleaner and
2 marking clerk which exist in significant numbers in the national economy. Claimant is
not disabled.

3 Before Appeals Council:

4 Date of Decision: September 17, 2013

5 Appears in Record at: AR 493-498

6 Summary of Decision: Declined Review

7 PROCEDURAL HISTORY – THIS COURT

8 Jurisdiction based upon: 42 U.S.C. § 405(g)

9 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

10 RECOMMENDATION OF
11 UNITED STATES MAGISTRATE JUDGE

12 (X) Affirm

13 SUMMARY OF RECOMMENDATION

14 The ALJ determined that Plaintiff's personality disorder was non-severe and the
15 resulting impairments were integrated with his anxiety and depression. The evidence supports
16 the finding of a non-severe impairment and included no specific limitations related to the
17 personality disorder. Additionally, the ALJ specifically defined the RFC to reflect Plaintiff's
18 capacity assuming no use of substances. Analysis in this way does not comply with the proper
19 procedure for drug and alcohol abuse cases defined by *Bustamante v. Massanari*. This was
20 harmless error, however. The decision of the ALJ should be affirmed.

21 STANDARD OF REVIEW

22 Pursuant to 42 U.S.C. § 405(g), this Court must set aside the Commissioner's denial of
23 Social Security benefits when the ALJ's findings are based on legal error or not supported by
24 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th

1 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
2 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
3 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
4 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
5 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
6 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
7 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
8 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
9 susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that
10 must be upheld. *Id.*

11 EVALUATING DISABILITY

12 The claimant bears the burden of proving disability within the meaning of the Social
13 Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal
14 citations omitted). The Act defines disability as the “inability to engage in any substantial
15 gainful activity” due to a physical or mental impairment which has lasted, or is expected to
16 last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A),
17 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are of such
18 severity that he is unable to do his previous work, and cannot, considering his age, education,
19 and work experience, engage in any other substantial gainful activity existing in the national
20 economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th
21 Cir. 1999).

22 The Commissioner has established a five-step sequential evaluation process for
23 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
24 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At

step five, the burden shifts to the Commissioner. *See also Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

ISSUES ON APPEAL¹

1. Did the ALJ properly determine that Plaintiff’s personality disorder is non-severe?
2. Did the ALJ improperly decline to order additional medical testing to determine the extent and effect of Plaintiff’s personality disorder?
3. Did the ALJ properly assess Plaintiff’s RFC?

DISCUSSION

I. Personality Disorder

The Appeals Council remanded the first ALJ decision for further consideration of Plaintiff’s physical and emotional impairments. After a second hearing, the ALJ determined that Plaintiff’s alleged personality disorder NOS was medically indeterminable. The District Court disagreed with this finding, because “plaintiff met his burden of providing medical evidence consisting of signs and symptoms of a personality disorder.” AR 715. The Court directed the ALJ “to reevaluate the medical evidence to determine whether a personality disorder should be included as a severe impairment, and whether a personality disorder would contribute additional functional limitations. The ALJ is directed to develop the record further if necessary, including obtaining further evaluation of plaintiff or expert medical testimony.” AR 715.

After remand and rehearing, the ALJ issued a decision including personality disorder as a non-severe impairment. AR 507-8. The ALJ stated that:

¹ Plaintiff’s Opening Brief in this Court included an objection to the Commissioner’s failure to file and provide a transcript of the third ALJ hearing. That transcript has since been filed, and Plaintiff has acknowledged that the issue is moot. As a result, the issue will not be addressed in this Report and Recommendation.

1 medical evidence indicates the signs and symptoms of a personality disorder
2 NOS; therefore I find it to be a medically determinable impairment. I further
3 find however that the claimant's personality disorder NOS is "not severe"
because medical and other evidence establishes only slight abnormalities that
have no more than a minimal effect on his ability to work. AR 508.

4
5 *A. Supplementation of the record*

6 The ALJ did not order medical testing or expert testimony to supplement the record. The
7 ALJ stated,

8 At the hearing, I mentioned that I might have the claimant sent for
9 consultative psychological evaluation. However, after further thought and
10 evaluation of the evidence, I decided against this possibility. The claimant
11 already has participated in numerous psychological evaluations by several
physicians. Moreover, given his active substance abuse, there is no guarantee he
would be capable of meaningfully participating in psychological evaluation. AR
503-4.

12 The ALJ held the record open for Plaintiff to submit additional medical evidence. Plaintiff did
13 not do so, but his counsel advised the ALJ this was because Plaintiff is homeless and cannot
14 afford the cost of additional testing. AR 819. Plaintiff now contends that the ALJ did not
15 adequately supplement the record with additional medical evidence to resolve questions as to
16 the existence of his personality disorder. The Commissioner counters that the District Court did
17 not require that the ALJ obtain additional evidence, that the ALJ adequately fulfilled the
18 remand instructions, and that she satisfied the obligation by holding the record open.

19 In a Social Security case, the ALJ has an independent duty to fully and fairly develop the
20 record so that a claimant's interests are considered. *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th
21 Cir. 1996). Ambiguous evidence or the ALJ's determination that the record is inadequate
22 triggers the ALJ's duty to conduct an appropriate inquiry. *Tonapetyan v. Halter*, 242 F.3d
23 1144, 1150 (9th Cir. 2001). "The ALJ may discharge this duty in several ways, including:
24 subpoenaing the claimant's physicians, submitting questions to the claimant's physicians,

1 continuing the hearing, or keeping the record open after the hearing to allow supplementation
2 of the record.” *Id.*

3 In this case, the record contained numerous medical evaluations. The ALJ did not find the
4 record ambiguous or inadequate. Therefore, other than the District Court’s remand instructions,
5 the record did not trigger a requirement to supplement the record. The District Court’s order
6 did not require additional medical evidence, but merely advised the ALJ to obtain further
7 information as necessary. The ALJ considered the substantial medical evidence already
8 included, allowed Plaintiff to submit additional evidence, and held the record open after the
9 hearing. This satisfied the duty to fully and fairly develop the record.

10 B. *Non-Severe Impairment*

11 Plaintiff contends that the ALJ erroneously found that his personality disorder is non-
12 severe. The claimant must prove the existence of a severe impairment by providing medical
13 evidence. 20 C.F.R. §§ 404.1508, 416.908. “An impairment is not severe if it is merely ‘a
14 slight abnormality (or combination of slight abnormalities) that has no more than a minimal
15 effect on the ability to do basic work activities.’” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th
16 Cir. 2005) (*quoting* S.S.R. No. 96–3(p) (1996)).

17 Here, the ALJ determined that Plaintiff’s personality disorder was non-severe because the
18 medical and other evidence shows only slight abnormalities with minimal effect on the ability
19 to work. AR 508. The ALJ supports this conclusion with medical evidence from the record
20 cited throughout the decision. Dr. Parlatore conducted two mental evaluations, both resulting
21 in a diagnosis of personality disorder. AR 333, 1073, 511. Both exams noted that Plaintiff was
22 congenial, pleasant and polite, with full affect. AR 332, 1074, AR 1076, 511. After the
23 February 2008 exam, Dr. Parlatore opined that it was unclear why Plaintiff was not working.
24 AR 333, 513. Clearly, Dr. Parlatore believed that Plaintiff’s mental impairments should not

1 have impacted his ability to work. In August 2010, Dr. Parlatore noted some moderate to
2 marked difficulties in social functioning. AR 1074, 514. However, rather than attributing this
3 to Plaintiff's personality disorder, Dr. Parlatore opined that the mood and motivation issues
4 were related to active substance abuse. AR 1073, AR 514. No specific limitations were
5 attributed to the personality disorder.

6 Two medical consultants also diagnosed personality disorder. AR 346, 360, 507. Dr.
7 Clifford found that Plaintiff was not significantly limited in concentration, social interaction,
8 and adaptation. AR 354. He found Plaintiff personable, in good humor, and able to work well
9 with others. AR 355. Dr. Eather included the personality disorder diagnosis but specifically
10 stated that it is non-severe. AR 360.

11 The evidence from several evaluating medical professionals is equivocal as to personality
12 disorder. Dr. Hakeman examined Plaintiff in August 2011 and noted a possible personality
13 disorder, but included no additional symptoms or descriptions to support the tentative
14 diagnosis. AR 1124, AR 508. Dr. Lind made no diagnosis of personality disorder in March
15 2007. AR 436. Dr. Saxvik diagnosed PTSD, and noted symptoms of anxiety and depression,
16 but made no mention of a personality disorder. AR 480-1, AR 508.

17 Plaintiff produced medical evidence of a personality disorder, allowing for a medically
18 determinable impairment. However, the evidence shows a mild impact and minimal resulting
19 limitations. The ALJ found the personality disorder to be a non-severe impairment based on
20 substantial evidence in the record. This was not error.

21 II. Residual Functional Capacity

22 A. *Personality disorder in the RFC*

23 In determining the RFC, the ALJ must consider the limiting effects of all impairments,
24 including those that are not severe. 20 C.F.R. § 404. 1545(e); *Burch v. Barnhart*, 400 F.3d 676,

1 683 (9th Cir. 2005). Here, the ALJ assessed the limiting effects of the personality disorder in
2 combination with Plaintiff's anxiety, depression, and substance abuse. "I find that it is related
3 to years of continuing substance abuse, and not an independent condition. Moreover, his
4 symptoms are fully intertwined with his depressive disorder and anxiety disorders, and the
5 residual functional capacity finding...accounts for those symptoms." AR 508. Plaintiff
6 contends that the ALJ provided no evidence that the symptoms of these mental impairments
7 overlap. However, as seen above, substantial evidence supports the finding that Plaintiff's
8 personality disorder is non-severe. The record contains no evidence that his personality
9 disorder gives rise to additional limitations. The absence of such limitations from the RFC is
10 not error.

11 *B. Medical Evidence*

12 The Commissioner concedes that the ALJ erred by failing to assign weight and fully
13 address Dr. Hakeman's medical opinion. In August 2011, Dr. Hakeman diagnosed a possible
14 personality disorder and found moderate and marked limitations in some cognitive and social
15 interactions. AR 1124-5. Dr. Hakeman specifically noted that Plaintiff can have difficulties
16 with others which would markedly impact his ability to communicate and perform effectively
17 in a work setting with public contact. AR 1125.

18 The Commissioner contends any error to specifically weight and evaluate Dr. Hakeman's
19 opinion was harmless because the limitations identified by Dr. Hakeman were properly
20 rejected elsewhere in the opinion. Dr. Hakeman's assessment coincides with that of Dr. Saxvik
21 from January 2009. AR 482. Dr. Saxvik's opinions were properly given little weight by the
22 prior ALJ, because they were inconsistent with the record and based on self-reports from a
23 claimant of dubious credibility. AR 20, 725-7. This assessment of Dr. Saxvik's opinion was
24

1 incorporated by this ALJ and applies readily to the similar opinion of Dr. Hakeman. AR 514.

2 The ALJ's failure to specifically discuss Dr. Hakeman's opinion was harmless error.

3 The Plaintiff also contends that the ALJ failed to properly consider Dr. Parlatore's second
4 evaluation in August 2010. The ALJ gave little weight to this evaluation because Dr. Parlatore
5 opined that the Plaintiff's mood and motivation were affected by active substance abuse, and
6 the new evaluation did not significantly alter the prior findings. AR 514. Like the first
7 assessment, Dr. Parlatore noted that Plaintiff was affable and pleasant with a full affect. AR
8 1076. However, after the second examination, Dr. Parlatore marked the form check boxes to
9 indicate that Plaintiff had a marked limitation in ability to respond appropriately and tolerate
10 the expectations of a work setting, and moderate limitations in his ability to relate to others.
11 AR 1074. Dr. Parlatore included no reasoning for this conclusion, which differs from the
12 congenial description of Plaintiff. AR 1074. Given that Dr. Parlatore provided no evidence of
13 significantly different findings or support for the newly assessed limitations, the ALJ did not
14 err in giving little weight to the August 2010 evaluation.

15 C. *Substance Abuse*

16 Claimants are not considered disabled and eligible for benefits if alcoholism or drug
17 addiction is a contributing factor. 42 U.S.C. §§423(d)(2)(C), 1382c(a)(3)(J); *Bustamante v.*
18 *Massanari*, 262 F.3d 949, 954 (2001). To determine whether substance abuse is a contributing
19 factor, the ALJ must first conduct the five-step inquiry "without separating out the impact of
20 alcoholism." *Bustamante*, 262 F.3d at 955. If the ALJ finds the claimant not disabled, then no
21 further analysis is required. *Id.* However, upon a finding of disability, the ALJ must conduct a
22 second five-step inquiry to determine if the claimant would still be disabled in the absence of
23 substance abuse. *Id.* Here, the ALJ found substance abuse to be a severe impairment, and then
24 specifically defined the RFC "[a]ssuming the claimant is not operating under the influence of

1 substances.” AR 506, 509. The ALJ chose to short-cut the required process by making one, and
2 only one, disability analysis, in which she explicitly removed the impact of drug and alcohol
3 use from the RFC.

4 Plaintiff alleges that the ALJ improperly considered his severe substance abuse disorder
5 when establishing his RFC. The Commissioner concedes that the ALJ failed to follow the
6 proper procedure to account for the impact of Plaintiff’s drug and alcohol abuse (DAA). But,
7 the Commissioner contends that this error was harmless. *See, Parra v. Astrue*, 481 F.3d 742,
8 747 (2007) (although the ALJ did not explicitly determine that claimant was disabled, the
9 DAA analysis assumed that Plaintiff was disabled and any error was harmless). An error is
10 harmless “where the mistake was nonprejudicial to the claimant or irrelevant to the ALJ’s
11 ultimate disability conclusion.” *Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th
12 Cir. 2006).

13 Under *Bustamante*, the ALJ must conduct the initial five step inquiry without attempting to
14 determine the impact of substance abuse on the claimant. *Bustamante*, 262 F.3d at 955. The
15 limitations caused by substance abuse should have been separated out of the RFC only when
16 and if the ALJ first found that Plaintiff, was disabled with his DAA related impairments. In
17 this case, the ALJ omitted the initial disability determination, but arrived at the same
18 conclusion. Had the ALJ crafted the RFC to include the impairments from substance abuse and
19 found Plaintiff was not disabled, then the inquiry would end. If the ALJ had found Plaintiff,
20 with his substance abuse, was disabled, the next step would have been to repeat the disability
21 analysis omitting the limitations caused by DAA, precisely as done in this case. Regardless of
22 the route the ALJ followed, the determination would have been the same—Plaintiff is not
23 disabled. The error was harmless.

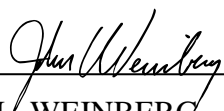
CONCLUSION

For the foregoing reasons, the Court recommends that this case be AFFIRMED and the case DISMISSED. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, must be filed with the Clerk and served upon all parties to this suit no later than fourteen (14) days after the date on which this Report and Recommendation is signed. If no timely objections are filed, the Clerk shall note this matter for the earliest Friday after the deadline for objections, as ready for the Court's consideration. Failure to file objections within the specified time may affect a party's right to appeal.

If objections are filed, any response is due within fourteen (14) days after being served with the objections. A party filing an objection must note the matter for the court's consideration fourteen (14) days from the date the objection is filed and served. Objections and responses shall not exceed twelve pages.

DATED this 25th day of September, 2014.



JOHN L. WEINBERG
United States Magistrate Judge